IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 314 OF 2023

DOMINICK MILLING GROUP LIMITED.....1ST APPLICANT

LEONARD DOMINICK RUBUYE.....2ND APPLICANT

VERSUS

TANZANIA AGRICULTURAL

DEVELOPMENT BANK LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

21st June, 2023 & 28th July, 2023

L. HEMED, J.

The applicants **Dominick Milling Group Limited** and **Leonard Dominic Rubuye** have filed the instant application under section 2 (3) of the Judicature and Application of Laws Act, [Cap. 358 R.E 2019] and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] praying for the following orders:

EXPARTE

"a*) That this Honourable Court my be pleased to grant status quo ante pending interparties hearing of this Application.*

INTERPARTIES

b) That this Honourable Court may be pleased to issue an order for temporary injunction restraining the 1st Respondents, their agents and workmen's from Auctioning, disposing, selling alienating, entering into possession, appoint a receiver or evicting the Applicants, in suit properties over Plot No. 33 Block A with certificateof Title No. 16947 located at Mponela village, Mbozi District, Songwe Region in the name of Dominic Milling Group Limited, over Plot No. 204, Block 'A' with Certificate of Title No. 53353 in the name of Leonard Dominick Rubuye Pending the expiration of statutory Notice to sue the Respondents and institution of the suit against the respondents.

c).....

d)....."

The applicants have moved this court for the above said orders of *mareva injunction* by the support of the affidavit deponed by one Leonard Dominick Rubuye, the 2nd Applicant. The respondents disputed the application through the counter affidavit deponed by one Mussa Chiemo, principal Officer of the 1st Respondent.

In this Application, the applicants were represented by **Mr. Tazan Keneth Mwaiteleke**, learned advocate while the respondents enjoyed the service of **Mr. Thomas Mahushi**, learned State Attorney. The application was argued by way of written submissions; whereas, the parties complied with the directed schedule.

Arguing in support of the application, the counsel for the applicant stated that in determining the application at hand, the court has to be guided by the principles of granting temporary injunction as set out in the case of **Attilio vs Mbowe (1967) HCD 287**. The Principles are such that; there should be a *prima facie* case between the Applicant and the Respondent,

needs for court intervention to prevent and irreparable loss and that the balance of convenience tilts to the Applicant.

Regarding the condition of having a *prima facie* case, it has been asserted that the Applicants are challenging the Notices of Default to be premature and is contrary to the contracts entered into between the 1st Applicant and the 1st Respondent under various credit facility letters issued to the 1st Applicant. To cement his argument, he cited the decision of the Court of Appeal in the case of **Abually Alibhai Aziz vs Bhatia Brothers Ltd** [2000] TLR 288 on the Principle of sanctity of contract. The arguments of the applicants' advocate were based on paragraphs 11,12,13, 14 and 15 of the affidavit deponed to support the application, where it has been stated generally that the 1st respondent did not honour the facility by failure to disbursy the agreed amount timely, among others.

It was argued by the learned counsel for the applicants that the 1st respondent has issued Notices of default against the applicants seeking to sell and/or alienate the charged properties of the applicants. In his opinion, if this is done, the applicants will not be able to have the two factories and other properties charged to the 1st Respondent, back to them even if they

win the anticipated suit to be filed, as the said properties will be in the hands of the 3rd parties. He added that monetary compensation will not be adequate to bring back the said two factories in Mbozi and Kibaha.

It was further submitted by the counsel for the applicants that granting of temporary injunction will not prejudice and or inconvenience the Respondents as will do to the applicants if it is not granted. The Respondent is full secured on its loan as it is holding various properties from the Applicants which are of high value. He concluded by stating that the requirements for temporary injunction as set out in the case of **Attilio vs Mbowe** (*supra*) have been met, thus the application should be granted.

In reply thereof, the learned state attorney stated that the applicants have no serious issue to be tried in this honourable court because they instituted the application after having been served with the 60 days notice to pay the loan facility to the tune of TZS 5,296,806,359/=. He argued that the applicants have never honored payments of the credit up to the date of demand notice on 15/03/2023. In fortifying his argument he cited the decision in **Private Agricultural Sector Support Trust & Another vs Kilimanjaro Cooperative Bank Ltd,** Consolidated Civil Appeals No. 171

of 2019 [2022] TZCA 637 (19 October, 2022) on the responsibilities of the borrower to repay loans.

He contended further that, the applicants have no any chances of success if they bring the case against the respondents. In his opinion, the applicants intend to weaken the Bank's business because the applicants are the ones who breached the terms of the credit facilities agreements. He was of the view that the applicants are not entitled to the orders sought because they are the ones in breach of the loan agreement.

He asserted that the applicants have no *prima* facie case to be tried in this court as they only want to misuse the power of this court and use it as hiding bush. To support his arguments, he cited the case of **Hydrox Industrial Services Ltd & Another vs CRDB (1996) Ltd & 2 others,** Civil Case No. 194 of 199 [HC] and the case of General Tyre East Africa Ltd vs HSBC Bank PLC [2006] TLR 60, on the requirement of banks/lenders and their customers/borrowers to fulfil and enforce their respective contractual obligations under lending agreements.

As to the condition of irreparable Loss, counsel for the respondents stated that if this honourable court allows selling of the disputed properties,

the applicants will never suffer any irreparable loss since each disputed property has its valuation report in monetary form, hence if the Applicants will win the case in future, the same can be compensated accordingly.

As to the 3rd condition on the hardship to be suffered, he stated that the applicants have failed to prove on balance of inconveniences, since there is no dispute that the 1st Applicant received loan facilities from the 1st Respondent and utilized them without any repayment. In his view, it is the 1st respondent who will suffer greater financial loss if the said temporary injunction will be granted. He supported the argument by the decision in the **Hydrox Industrial Services Ltd & Another vs CRDB** (supra).

Having gone through the rival submissions made by the learned counsel for both parties, the question for determination is whether the application for *mareva injunction* has merits. I am at one with both learned counsel that the guiding factors for determination of the application like the like one at hand are as provided in the decision of the court in **Attilio vs Mbowe** (*supra*).

The 1st condition according to the aforesaid case, there must be a *prima facie* case between the Applicants and the Respondents. I have read

the Affidavit supporting the application and the Counter Affidavit that opposes it. In the affidavit deponed by the 2nd applicant and the submission thereof, the applicants are blaming the 1st respondent for breach of the credit facility. The applicants have stated that the amounts which were approved and granted to them as loan, were not disbursed in full by the 1st respondent and hence denying the 1st applicant the money needed as working capital. The 1st applicant having successfully built, its factories at Zegereni, Kibaha coast region and at Mponela village, Mbozi District, Songwe region was ready to go for the production. According to the applicants it was the purpose of the said short term loan to provide the said working capital. However, the 1st respondent reneged to do the same contrary to the said counterfactual obligation.

The 1st respondent has also stated through the counter affidavit deponed by one Mussa Chiemo that the applicants have failed to honour the terms of the loan agreement by failure to repay the loan according to the credit facility terms. In my firm view, the above rival facts deponed in the rival affidavits and argued by the learned counsel , show the existence of a *prima-facie* case between the applicants and the respondents. I have examined the decision cited by the learned counsel for the respondent and

found that they are relevant at the stage of detrmining the case between the parties on merits. The application of the said decisions is premature in the matter at hand.

On the 2nd condition of irreparable loss the applicants have submitted that, the loss which they will face after selling of the disputed properties will not be accumulated in monetary compensation. I am of the view that loss that emanates from disposition of the pledged properties may be compensated through monetary value. However, it should be taken into account that in cases like the one at hand the person whose properties have been auctioned, if he has a genuine case, he must be affected psychologically. Losses occurring from mental anguish cannot be remedied through monetary compensation. From the foregoing I find that the applicants have demonstrated irreparable loss which may occur if the suit properties are auctioned.

The 3rd condition that the applicant must show that there will be grater hardship and mischief to suffer by the applicant from withholding of injunction than will be suffered by the respondent from granting it. The applicants have stated that if injunction order is not granted, the suit properties will be alienated to the third parties to the defriment of the

applicants. Having examined the nature of the case at hand, I have come to the firm view that granting of temporary injuction will not prejudice and/ or inconvenient the respondents as will do to the applicants, if it is not granted. I am holding so because the 1st respondent is full secured on the disputed loans as it holds various properties from the applicants (the suit landed properties).

In the final analysis, I find that the application at hand has met all the conditions set out in the case of **Attilio vs Mbowe** (1967) HLF 287, it deserves to be granted. Being an application for *mareva injunction* it cannot be granted pending a suit.

I do subscribe to the position held by my brother to the bench, Hon. Galeba, J. (as he then was) in **Daud Mkwaya Mwita vs Butiama Municipal Council and AG,** Misc. Land Application No. 60 of 2020, Hc. At Musoma, where he state thus: -

> *"It is an application pending obtaining a legal standing to institute a suit. A mareva injunction may be applied where an applicant cannot institute a law suit because of the existing legal impediment for instance where the law requires that a statutory*

notice be issued before a potential plaintiff can institute a suit"

In the present case, the statutory notice was served to the government institution concerned, including the office of the solicitor general on 23rd May 2023, therefore, the 90 days will expire by 23rd August 2023. In the circumstance thereof, I grant the application with the following orders: -

1. *STATUS QUO* be maintained on the suit properties pending expirely of the statutory 90 days' notice by 23rd August 2023.
2. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 28th July 2023.

THE HIGH COURT OF TANZANIA
LAND DIVISION

L.HEMED
JUDGE